**From:** LERS, EOIR (EOIR)
**To:** All of CLAD (EOIR); All of Judges (EOIR); All of OCIJ JLC (EOIR); Allen, Patricia M. (EOIR); Anderson, Jill (EOIR); Baptista, Christina (EOIR); Barry, Robert (EOIR); Bauder, Melissa (EOIR); Berkeley, Nathan (EOIR); BIA ATTORNEYS (EOIR); BIA BOARD MEMBERS (EOIR); BIA TEAM JLC; BIA TEAM P (EOIR); Brazill, Caitlin (EOIR); Burgie, Brea (EOIR); Burgus, Elizabeth (EOIR); Calvert, Irvina (EOIR); Cardenas, Lupe (EOIR); Carr, Donna (EOIR); Cicchini, Daniel (EOIR); Cowles, Jon (EOIR); Crossley, Maurice (EOIR); Cudo, Relanie (EOIR); Curry, Michelle (EOIR); D"Angelo, Matthew (EOIR); Evans, Brianna (EOIR); Friedman, Paul (EOIR); Gonzalez, Robert (EOIR); Grodin, Edward (EOIR); Hammond, Nicole (EOIR); Hartman, Alexander (EOIR); Hess, Chris (EOIR); Kaplan, Matthew (EOIR); King, Jean (EOIR); Korniluk, Artur (EOIR); Lang, Steven (EOIR); LERS, EOIR (EOIR); Lovejoy, Erin (EOIR); Martinez, Casey L. (EOIR); Mitchell, Carla (EOIR); Morteo, Cristina (EOIR); Noferi, Mark (EOIR); Nunez, Steven (EOIR); O"Hara, Shelley M. (EOIR); Park, Jeannie (EOIR); Podgorski, Monika (EOIR); Powell, Karen B. (EOIR); Ramirez, Sergio (EOIR); Rimmer, Phillip (EOIR); Robbins, Laura (EOIR); Rodrigues, Paul A. (EOIR); Rodriguez, Bernardo (EOIR); Rothwarf, Marta (EOIR); Sanders, John W. (EOIR); Santoro, Christopher A (EOIR); Schaaf, Joseph R. (EOIR); Smith, Terry (EOIR); Stutman, Robin M. (EOIR); Swanwick, Daniel (EOIR); Taufa, Elizabeth (EOIR); Vayo, Elizabeth (EOIR)
**Cc:** McHenry, James (EOIR); Reilly, Katherine (EOIR); Sheehey, Kate (EOIR); Moutinho, Deborah (EOIR); Alder Reid, Lauren (EOIR); Adams, Amanda (EOIR); Pease, Jeffrey (EOIR); Macri, Andrea (EOIR); Morgan, Kenosha (EOIR); EOIR Library (EOIR)
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EXECUTIVE OFFICE FOR
**IMMIGRATION REVIEW**
Office of Policy | Legal Education and Research Services Division

# Policy & Case Law Bulletin
November 9, 2018

## Federal Agencies

DOJ

- DOJ and DHS Issue New Asylum Rule Applying President's Authority to Suspend Entry to Asylum

  On November 8, 2018, the Acting Attorney General and the Secretary of DHS announced an Interim Final Rule declaring that those aliens who contravene a presidential suspension or limitation on entry into the United States through the southern border with Mexico issued under section 212(f) or 215(a)(1) of the Act will be rendered ineligible for asylum. See also Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States, and EOIR Policy Memorandum 19-02: Guidelines Regarding New Regulations Governing Asylum and Protection Claims, previously distributed to All of EOIR.

- DOJ Settles Immigration-Related Discrimination Claim Against New York Hotel

  On November 7, 2018, the DOJ announced that it reached a settlement with MJFT Hotels of Flushing LLC, the management company operating the Hyatt Place Hotel Flushing/Laguardia Airport in Queens, New York. The settlement resolves a complaint that the company discriminated against a work-authorized immigrant in violation of the anti-discrimination provision of the Immigration and Nationality Act.

- Virtual Law Library Weekly Update — EOIR

  This update includes resources recently added to EOIR's internal or external Virtual Law Library, such as Federal Register Notices, country conditions information, and links to recently-updated immigration law publications.

DHS

- USCIS to Continue Implementing New Policy Memorandum on Notices to Appear

  On November 8, 2018, USCIS announced it is continuing to implement its June 28, 2018,

Policy Memorandum. Starting Nov. 19, 2018, USCIS may issue Notices to Appear based on denials of I-914/I-914A, Application for T Nonimmigrant Status; I-918/I-918A, Petition for U Nonimmigrant Status; I-360, Petition for Amerasian, Widow(er), or Special Immigrant (Violence Against Women Act self-petitions and Special Immigrant Juvenile Status petitions); I-730, Refugee/Asylee Relative Petitions when the beneficiary is present in the US; I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant; and I-485 Application to Register Permanent Residence or Adjust Status (with the underlying form types listed above).

DOL

- OFLC Publishes FY2018 H-2B Foreign Labor Recruiter List

"Pursuant to 20 CFR § 655.9(c), the Office of Foreign Labor Certification (OFLC) is publishing an updated list of the names of foreign labor recruiters. The list also contains the identity and location of persons or entities hired by, or working for, the recruiter that employers have indicated they engaged, or planned to engage, in the recruitment of prospective H-2B workers to perform the work described on their Form ETA-9142B, H-2B Application for Temporary Employment Certification. The H-2B Foreign Labor Recruiter List includes cumulative cases filed from October 1, 2017 through September 30, 2018. By providing this Foreign Labor Recruiter List, OFLC is providing a greater level of transparency to the H-2B worker recruitment process and facilitating information sharing between the Department of Labor, other agencies, and the public."

DOS

- DOS Updates 9 FAM

DOS made updates to section 502.6 (U) (diversity immigrant visas) to reflect changes that implement new procedures and adjudication standards made to the 2019 Diversity program. Additional updates were made to section 504.4 (U) (pre-appointment processing) to correct procedures for submitting medical screening forms.

## Supreme Court

CERT. DENIED

- Diaz v. Sessions

2018 U.S. LEXIS 6541, __ S. Ct. __, 2018 WL 4283148 (Nov. 5, 2018)

Questions Presented: (1) Whether the Fifth Circuit Court of Appeals is incorrect in holding that the "departure bar" regulations under 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1) are permissible with respect to sua sponte motions to reopen, contrary to the holding of the Ninth Circuit Court of Appeals, which holds that these regulations are ultra vires and contrary to the relevant provisions of the Immigration and Nationality Act. (2) Whether the Court of Appeals for the Fifth Circuit erred as a matter of law and contradicted its own precedential decisions in Lugo-Resendez v. Lynch, 831 F.3d 337 (5th Cir. 2016) and Gonzalez-Cantu v. Sessions, 866 F.3d 302 (5th Cir. 2017), when the court summarily dismissed Petitioner's petition for review despite the fact that Petitioner's case, based on the facts, warranted equitable tolling of the time limitations for motions to reopen. (3) Whether the Court of Appeals for the Fifth Circuit erred in denying Petitioner's petition for review despite the fact that a gross miscarriage of justice occurred on account of the fact that Petitioner is no longer deportable as charged in his Order to Show Cause.

## Fifth Circuit

- Mauricio-Benitez v. Sessions

No. 17-60792, 2018 WL 5839696 (5th Cir. Nov. 8, 2018) (Motion to Reopen; In Absentia)

The Fifth Circuit denied the PFR, holding that the Board did not err in denying Mauricio-Benitez's motion to reopen and rescind the 2004 in absentia removal order where "Mauricio-Benitez—despite having been personally served with a [Notice to Appear] informing him that he would receive a notice setting a hearing date and time—made no effort to correct his NTA, update his mailing address with the court when he moved six months after receiving the NTA, or otherwise follow up on his immigration status for thirteen years." In addition, the court agreed with the Board's determination that Mauricio-Benitez had not presented sufficient evidence to rebut a presumption that a notice of hearing had been properly delivered by regular mail.

## Seventh Circuit

- Plaza-Ramirez v. Sessions

  No. 14-2828, 2018 WL 5815015 (7th Cir. Nov. 7, 2018) (Withholding of Removal; Nexus)

  The Seventh Circuit denied the PFR, affirming the decisions of the IJ and Board denying withholding of removal. Plaza-Ramirez asserted that he fears returning to Mexico because in 1999 he was physically attacked by members of the Los Negros gang and in 2010 his girlfriend's sister was kidnapped for ransom in his home town by a member of the same gang. The court determined that "[s]ubstantial evidence supports the IJ's conclusion that no nexus existed between the attack and Plaza-Ramirez's family membership" where he "admitted that there were no threats against any of his other family members" and that "he was attacked because he was mistakenly associated with his [cousin's] rival gang." The court also agreed with the IJ that "the 2010 kidnapping of Plaza-Ramirez's girlfriend's sister related only to the general violence in Mexico."

- Molina-Avila v. Sessions

  No. 17-1723, 2018 WL 5292058 (7th Cir. Oct. 25, 2018) (Convention Against Torture; Motions)

  The Seventh Circuit denied the PFR, concluding that substantial evidence supports the IJ and Board decisions denying Molina-Avila's application for Convention Against Torture deferral because Molina-Avila relied heavily on threats about Molina-Avila made by Mara 18 to his brother, Edgar, at least three years earlier, and those threats contained no specifics and were made at indeterminate times prior to Edgar's death. The court further concluded that the evidence did not compel the conclusion that safe relocation within Guatemala would be impossible where the evidence did not demonstrate that Mara 18 controls all of Guatemala; that if the individuals who tortured Edgar never encountered Molina-Avila, he would not be recognized; and he did not adequately explain why he would be required to live in hiding. Lastly, the court concluded that the Board applied the correct standard of review to Molina-Avila's motion to reopen where the Board's statement that "[t]he evidence was insufficient to show prima facie that alien would more likely than not be persecuted in Guatemala based on a protected ground" indicated that the correct standard of review was applied.

## Eighth Circuit

- United States v. Ramirez-Jimenez

  No. 17-3059, 2018 WL 5726687 (8th Cir. Nov. 2, 2018) (Ineffective Assistance)

  The Eighth Circuit affirmed the district court, concluding that Ramirez-Jimenez was not deprived of effective assistance of counsel in connection with his guilty plea where both his defense counsel and the presiding judge advised Ramirez-Jimenez at the change-of-plea hearing not only that his guilty plea carried a risk of deportation, but also that his removal was likely. Ramirez-Jimenez should also have known that removal was likely from the fact that he was in ICE custody with removal proceedings against him either pending

or imminent.

## Ninth Circuit

- Regents of the Univ. of Cal. v. DHS

  No. 18-15068, 2018 WL 5833232 (9th Cir. Nov. 8, 2018) (Deferred Action; DACA)

  The Ninth Circuit affirmed the district court's grant of preliminary injunctive relief, concluding that "[t]he government's decision to rescind the program known as Deferred Actions for Childhood Arrivals (DACA) is subject to judicial review" both under the APA and the INA. Turning to the merits of the preliminary injunction, the court concluded that "the plaintiffs are likely to succeed on their claim that the rescission of DACA . . . is arbitrary, capricious, or otherwise not in accordance with law." The court determined "that DACA was a permissible exercise of executive discretion, notwithstanding the Fifth Circuit's conclusion [in Texas v. United States, 809 F.3d 134 (5th Cir. 2015)], that the related [Deferred Actions for Parents of Americans (DAPA)] program exceeded DHS's statutory authority." The Ninth Circuit explained that "DACA is being implemented in a manner that reflects discretionary, case-by-case review, and at least one of the Fifth Circuit's key rationales in striking down DAPA is inapplicable with respect to DACA." In doing so, the Ninth Circuit emphasized that it does "not hold that DACA could not be rescinded as an exercise of Executive Branch discretion, . . . only that here, where the Executive did not make a discretionary choice to end DACA—but rather acted based on an erroneous view of what the law required—the rescission was arbitrary and capricious under settled law." The court also affirmed in part the district court's partial grant and partial denial of the government's motion to dismiss for failure to state a claim.

- Menendez v. Whitaker

  No. 14-72730, 2018 WL 5832974 (9th Cir. Nov. 8, 2018) (CIMT; Child Abuse)

  The Ninth Circuit granted the two separate PFRs, concluding that lewd or lascivious conduct in violation of Cal. Penal Code § 288(c)(1) is not categorically a CIMT. The court determined that a defendant is not required to have 'evil or malicious intent' because section 288(c)(1) requires only sexual intent, and a good-faith reasonable mistake of age is not a defense. Additionally, section 288(c)(1) does not require 'intent to injure' or 'actual injury.' The court also concluded that "because the statute contains a single, indivisible set of elements, the modified categorical approach does not apply." The court determined that section 288(c)(1) is not categorically a "crime of child abuse" under 8 U.S.C. § 1227(a)(2)(E)(i) because it is broader than the generic definition. The court concluded that section 288(c)(1) does not have a mens rea requirement that rises at least to the level of criminal negligence and does not require proof of actual injury, or a "sufficiently high risk of harm," as an element of the offense.

- Ma v. Sessions

  No. 15-73520, 2018 WL 5726692 (9th Cir. Nov. 2, 2018) (Adjustment)

  The Ninth Circuit denied the PFR, holding that the Board correctly concluded that Ma was ineligible for adjustment of status. Ma's employer filed for an extension of his H-1B visa, but it was denied, and his employer did not file an application for adjustment of status within 180 days of the expiration of his H-1B visa. As a result, Ma was without lawful status in the United States for 331 days before he applied to adjust his status—well over the 180 days permitted by 8 U.S.C. § 1255(k)(2)(A). However, Ma was legally authorized to work in the United States during the months between the expiration of his H-1B visa and the denial of his application for an H-1B extension pursuant to 8 C.F.R. § 274a.12(b)(20). The court determined that 8 C.F.R. § 1245.1(d) does not recognize regulatory employment authorization as conferring lawful immigration status for purposes of adjustment of status under 8 U.S.C. § 1255(k)(2)(A).